

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALEX KEOVILAI,

Plaintiff,

v.

KILOLO KIJAKAZI, acting
Commissioner of Social Security,

Defendant.

No. 1:20-cv-01487-GSA

**ORDER DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF DEFENDANT
COMMISSIONER OF SOCIAL SECURITY
AND AGAINST PLAINTIFF**

(Doc. 18)

I. Introduction

Plaintiff Alex Keovilai (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his applications for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act. The matter is before the Court on the parties’ briefs which were submitted without oral argument to the United States Magistrate Judge.¹ *See* Docs. 18, 21. After reviewing the record the Court finds that substantial evidence and applicable law support the ALJ’s decision. Plaintiff’s appeal is therefore denied.

II. Factual and Procedural Background²

On September 26, 2016 Plaintiff applied for disability insurance benefits alleging disability as of October 31, 2008. The Commissioner denied the application initially on December 15, 2016 and on reconsideration on March 8, 2017. AR 133, 144. Plaintiff requested a hearing which was held before an Administrative Law Judge (the “ALJ”) on December 4, 2018. AR 46–80. On March 15, 2019, the ALJ issued a decision denying Plaintiff’s application. AR 24–40. The Appeals Council denied his claim via decision issued April 24, 2020. AR 6–16. On October 19, 2020

¹ The parties consented to the jurisdiction of a United States Magistrate Judge. *See* Docs. 8 and 10.

² The Court has reviewed the relevant portions of the administrative record including the medical, opinion and testimonial evidence about which the parties are well informed, which will not be exhaustively summarized. Relevant portions thereof will be referenced in the course of the analysis below when relevant to the parties’ arguments.

1 Plaintiff filed a complaint in this Court. Doc. 1.

2 **III. The Disability Standard**

3 Pursuant to 42 U.S.C. §405(g), this court has the authority to review a decision by the
4 Commissioner denying a claimant disability benefits. “This court may set aside the
5 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
6 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
7 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the
8 record that could lead a reasonable mind to accept a conclusion regarding disability status. *See*
9 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is more than a scintilla, but less than a
10 preponderance. *See Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).

11 When performing this analysis, the court must “consider the entire record as a whole and
12 may not affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Social*
13 *Security Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citations and quotations omitted). If the
14 evidence could reasonably support two conclusions, the court “may not substitute its judgment for
15 that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112 F.3d 1064, 1066
16 (9th Cir. 1997) (citation omitted). “[T]he court will not reverse an ALJ’s decision for harmless
17 error, which exists when it is clear from the record that the ALJ’s error was inconsequential to the
18 ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

19 To qualify for benefits under the Social Security Act, a plaintiff must establish that
20 he or she is unable to engage in substantial gainful activity due to a medically
21 determinable physical or mental impairment that has lasted or can be expected to
22 last for a continuous period of not less than twelve months. 42 U.S.C. §
23 1382c(a)(3)(A). An individual shall be considered to have a disability only if . . .
24 his physical or mental impairment or impairments are of such severity that he is not
25 only unable to do his previous work, but cannot, considering his age, education, and
26 work experience, engage in any other kind of substantial gainful work which exists
27 in the national economy, regardless of whether such work exists in the immediate
28 area in which he lives, or whether a specific job vacancy exists for him, or whether
he would be hired if he applied for work.

42 U.S.C. §1382c(a)(3)(B).

To achieve uniformity in the decision-making process, the Commissioner has established a
sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§ 416.920(a)-

(f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929.

Specifically, the ALJ is required to determine: (1) whether a claimant engaged in substantial gainful activity during the period of alleged disability, (2) whether the claimant had medically determinable “severe impairments,” (3) whether these impairments meet or are medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1, (4) whether the claimant retained the residual functional capacity (“RFC”) to perform past relevant work, and (5) whether the claimant had the ability to perform other jobs existing in significant numbers at the national and regional level. 20 C.F.R. § 416.920(a)-(f). While the Plaintiff bears the burden of proof at steps one through four, the burden shifts to the commissioner at step five to prove that Plaintiff can perform other work in the national economy given her RFC, age, education and work experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014).

IV. The ALJ’s Decision

At step one the ALJ found that Plaintiff had not engaged in substantial gainful activity since his alleged onset date of October 31, 2008. AR 27. At step two the ALJ found that Plaintiff had the following severe impairments: disorder of the spine, diabetes mellitus with fatigue, and anal fissure. AR 28. At step three the ALJ found that Plaintiff did not have an impairment or combination thereof that met or medically equaled the severity of one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 31.

Prior to step four the ALJ evaluated Plaintiff’s residual functional capacity (RFC) and concluded that Plaintiff had the RFC to perform light work as defined in 20 C.F.R. 404.1567(b) with the following limitations: 10-15 minute breaks every two hours, occasional “posturals,” no exposure to environmental hazards (such as unprotected heights, fast or dangerous machinery, or commercial vehicles), requires easy access to a bathroom facility, limited to non-complex tasks, can read and write simple sentences only, communicate in simple words only, and has limited English skills. AR 32–38.

At step four the ALJ concluded that Plaintiff could not perform his past relevant work as a sheet rock tapper which required medium exertional capacity. AR 39. At step five, in reliance on

the VE's testimony, the ALJ concluded that Plaintiff could perform other jobs existing in significant numbers in the national economy. The ALJ omitted the representative jobs from her decision, though the VE did testify such jobs exist, and the Appeals Council included the same in its decision, namely: laundry sorter, housekeeper, produce sorter, and small parts assembler. AR 12, 75–76. The ALJ concluded that Plaintiff was not disabled at any time since his alleged onset date of October 31, 2008. AR 40.

V. Issues Presented

Plaintiff asserts two related claims of error, the first of which is not in dispute: 1) that the ALJ erred by failing to exhibit and weigh Dr. Michiel's opinion, and 2) that the Appeals Council's written decision did not cure the error. Br. at 1, Doc. 18.

A. Dr. Michiel's Opinion

1. Applicable Law

Before proceeding to step four the ALJ must first determine the claimant's residual functional capacity. *Nowden v. Berryhill*, No. EDCV 17-00584-JEM, 2018 WL 1155971, at *2 (C.D. Cal. Mar. 2, 2018). The RFC is "the most [one] can still do despite [his or her] limitations," and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96–8p.

A determination of residual functional capacity is not a medical opinion, but a legal decision that is expressly reserved for the Commissioner. *See* 20 C.F.R. §§ 404.1527(d)(2) (RFC is not a medical opinion), 404.1546(c) (identifying the ALJ as responsible for determining RFC). "[I]t is the responsibility of the ALJ, not the claimant's physician, to determine residual functional capacity." *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In doing so, the ALJ must determine credibility, resolve conflicts in medical testimony and resolve evidentiary ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039–40 (9th Cir. 1995).

1 “In determining a claimant’s RFC, an ALJ must consider all relevant evidence in the record
2 such as medical records, lay evidence and the effects of symptoms, including pain, that are
3 reasonably attributed to a medically determinable impairment.” *Robbins*, 466 F.3d at 883. *See also*
4 20 C.F.R. § 404.1545(a)(3) (residual functional capacity determined based on all relevant medical
5 and other evidence). “The ALJ can meet this burden by setting out a detailed and thorough
6 summary of the facts and conflicting evidence, stating his interpretation thereof, and making
7 findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Cotton v. Bowen*, 799
8 F.2d 1403, 1408 (9th Cir. 1986)).

10 For applications filed before March 27, 2017, the regulations provide that more weight is
11 generally given to the opinion of treating physicians, which are given controlling weight when well
12 supported by clinical evidence and not inconsistent with other substantial evidence. 20 C.F.R. §
13 404.1527(c)(2); *see also Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), as amended (Apr. 9,
14 1996) (noting that the opinions of treating physicians, examining physicians, and non-examining
15 physicians are entitled to varying weight in residual functional capacity determinations).

17 An ALJ may reject an uncontradicted opinion of a treating or examining physician only for
18 “clear and convincing” reasons. *Lester*, 81 F.3d at 831. In contrast, a contradicted opinion of a
19 treating or examining physician may be rejected for “specific and legitimate” reasons. *Id.* at 830.
20 In either case, the opinions of a treating or examining physician are “not necessarily conclusive as
21 to either the physical condition or the ultimate issue of disability.” *Morgan v. Comm’r of Soc. Sec.*
22 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). Regardless of source, all medical opinions that are not
23 given controlling weight are evaluated using the following factors: examining relationship,
24 treatment relationship, supportability, consistency, and specialization. 20 C.F.R. § 404.1527(c).
25 The opinion of a non-examining physician (such as a state agency physician) may constitute
26 substantial evidence when it is “consistent with independent clinical findings or other evidence in
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1 the record.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

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3 **2. Analysis**

4 On December 7, 2018, Dr. Michiel conducted a consultative psychiatric examination of
5 Plaintiff at the request of the agency. AR 724–27. Dr. Michiel identified diagnoses of adjustment
6 disorder with emotional features, depression, and anxiety. AR 726–27. Dr. Michiel opined
7 Plaintiff could: maintain attention and concentration to carry out simple job instructions; relate and
8 interact with coworkers, supervisors, and the general public while in the routine setting of
9 performing simple job instructions. AR 727. Dr. Michiel opined that Plaintiff was unable to
10 maintain attention and concentration to carry out an extensive variety of technical and/or complex
11 instructions. AR 727.

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13 In addition to the narrative opinion accompanying the mental status examination, Dr.
14 Michiel also completed a pre-printed Medical Statement of Ability To Do Work-Related Activities
15 (Mental), in which Dr. Michiel checked the box corresponding to moderate limitations for the
16 following abilities: carry out complex instructions; make judgments on complex work related
17 decisions; respond appropriately to usual work situations and changes in a routine work setting.
18 AR 728–29.

19
20 The ALJ failed to exhibit or discuss Dr. Michiel’s opinion, which Defendant and the
21 Appeals Council acknowledged. Though an ALJ “need not discuss all evidence presented,” the
22 ALJ must explain why “significant probative evidence has been rejected.” *Vincent ex rel. v.*
23 *Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). As one of two psychiatric examining opinions
24 in the record, Dr. Michiel’s opinion was undoubtedly probative of Plaintiff’s mental RFC
25 formulated prior to step four, and probative of the severity of Plaintiff’s mental impairments
26 considered at step two. The omission of the same from the ALJ’s discussion was error. The
27 question at issue therefore is whether the Appeals Council cured the error in its written decision.
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1 In rejecting Dr. Michiel's opinion, the Appeals Council stated as follows:

2 The file indicates that this report of psychological consultative examination (CE),
3 from Dr. Michiel, dated December 7, 2018 was not exhibited; nor was it discussed
4 in the decision. The results of this report were based solely on a one-time evaluation,
5 with observations. No medical records were reviewed. The results of the exam
6 showed no objective signs of mental impairment. The examination was conducted
7 with the help of a translator, but the claimant did report that he drives a car, attended
8 college in Laos, and also attended school studying English as a second language.
9 Dr. Michiel opined that the claimant is able to maintain attention and concentration,
10 carry out simple job instructions, relate and interact with coworkers, supervisors and
11 the general public in the routine setting, and perform simple job instructions. Dr.
12 Michiel did not explain the opinion that the claimant could perform simple tasks.
13 The results of the examination do not clarify why this conclusion was reached. Dr.
14 Michiel further opined that the claimant is unable to maintain attention and
15 concentration in order to carry out an extensive variety of technical and/or complex
16 instructions, and has no restrictions in performing activities of daily living. Dr.
17 Michiel did not explain why the claimant was so limited, other than to attribute this
18 to an inability to concentrate and attend to tasks sufficiently to perform such tasks.
19 However, the results of the examination do not support this conclusion because the
20 examination results showed no deficits. The examination report indicates however,
21 that only simple tasks were asked of the claimant during the examination. As such,
22 there was no indication that the claimant was limited in his performance of such
23 simple mental tasks. Tr. 10-11.

24 . . .

25 Plaintiff's analysis of the Appeals Council's pertinent reasoning begins on page 7 of his 7 page
26 brief. Br. at 7, Doc. 18.

27 To start, Plaintiff appropriately takes issue with the Appeals Council's observation that Dr.
28 Michiel's opinion was based on a one-time examination with no medical records reviewed. To the
extent the observation was intended to bolster the reasoning for rejecting the opinion, the critique
is not well taken. The one-time nature of the examination is an inherent characteristic of a
consultative examination which the Agency requested.³ Moreover, an identical observation was

³ Consultative examiners are not one of the claimant's treating providers and generally are not provided with medical records to review. The Disability Determination Service (DDS) physicians do review the claimant's medical file at the initial and reconsideration levels but do not examine the claimant. Moreover, their review often substantially predates the administrative hearing. A consultative examination and associated opinion provides a more contemporaneous appraisal of the claimant's functionality as of the date of the examination. Dr. Michiel's opinion did not purport to do more than that here. AR 729.

1 conspicuously absent when the Appeals Council and the ALJ discussed the consultative examining
2 opinion of Dr. Lewis, whose opinion supported a non-disability finding as it was also a one-time
3 examination with no medical records reviewed. AR 11, 36. Although the nature and extent of the
4 treating or examining relationship is a relevant regulatory factor to consider, it does not bear
5 mentioning unless it is a relevant basis upon which to distinguish between the opinions in the
6 record.
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8 Secondly, Plaintiff appropriately takes issue with the Appeals Council's observations that
9 he drives, attended college in Laos, and speaks English, which Plaintiff characterizes as "unrelated
10 and benign findings." Br. at 7. Education and language ability are vocational considerations
11 affecting the available jobs at step five, but those considerations are distinct from the severity of
12 Plaintiff's adjustment disorder, depression, anxiety and the mental limitations attributable to those
13 impairments.
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15 Moreover, the ALJ's description of Plaintiff's education and language ability during the
16 hearing paints a different picture than the one implied by the Appeals Council's language. *See* AR
17 79 (introducing the first hypothetical posed to the VE, and asking the VE to consider someone who
18 is "currently 51 years old. He has a *very limited* education in that he can only read, write and speak
19 *very simple limited* English.") (emphasis added). To the extent the Appeals Council's observations
20 concerning education and language ability were intended to bolster the conclusion that Dr.
21 Michiel's opinion was not supported, the point is not well taken.
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23 Thirdly, Plaintiff takes issue with the Appeals Council's conclusion that the results of the
24 mental status examination did not support the opinion. Plaintiff contends that the "Appeals
25 Council's interpretation is factually inaccurate and attempts to override Dr. Michiel's ability to
26 interpret his own assessment." Br. at 7. The Court disagrees.
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28 The Appeals Council's statement that "examination results showed *no* deficits" was perhaps

1 a bit of an overstatement. Plaintiff underscores objective observations including restricted affect
2 and fair eye contact. AR 725–26. The former is reflective of some degree of deficiency. The only
3 other mental status examination results potentially suggestive of deficiencies, however, were
4 depressed mood, two out of three object recall after five minutes, and four out of five digit recall in
5 reverse. These are scarcely supportive of the notion that Plaintiff had moderate limitations in
6 multiple areas of mental functioning attributable to his adjustment disorder, anxiety, and
7 depression. In every other respect however, Plaintiff’s mental status examination findings were
8 normal, including: 1) orientation to person, place and date; 2) five out of five digit span forward;
9 3) three out of three immediate object recall; 4) repeat and solve a simple math question; 5) said he
10 would call 911 if there was a neighborhood fire (judgment); and, 5) could recall what he had to eat
11 the night before, and the birthdays of his three children. AR 726.

14 If the evidence could reasonably support two conclusions, the court “may not substitute its
15 judgment for that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112
16 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). Plaintiff’s point is well taken that Dr. Michiel
17 (not the Court or the Agency) is best positioned to interpret the findings of the mental status
18 examination Dr. Michiel performed and translate the same into functional terms. And, in close
19 cases where the examination reveals substantial deficiencies but many normal findings as well, the
20 deferential principal quoted above from *Jamerson* is not always appropriate, and the physician’s
21 interpretation of his own examination should perhaps control (all other things being equal). Here,
22 however, it is sufficiently apparent even to a layperson that the mental status examination results
23 are not suggestive of moderate mental limitations as to task complexity, work-related judgment,
24 and ability to respond to routine changes in a work setting, as opined by Dr. Michiel.

26 Moreover, the Appeals Council noted two additional factors which Plaintiff does not
27 acknowledge. First, the Appeals Council appropriately noted that the basis for the identified
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1 limitations was not explained.⁴ Indeed, at question 1 (after the limitations are identified) the form
 2 asks the physician to “Identify the factors (e.g., the particular signs, laboratory findings, or other
 3 factors described above) that support your assessment.” AR 728. Dr. Michiel did not identify any
 4 particular signs or findings but simply repeated diagnoses already identified, namely “adjustment
 5 disorder with emotional features, depression, and anxiety.” *Id.* The same question was asked again
 6 at question 2, and Dr. Michiel wrote “[same] as in 1.” AR 729. The same question was asked
 7 again at question 3, and Dr. Michiel wrote “history, evaluation” without specifying what aspects of
 8 the history or evaluation supported the opinion. *Id.* The agency may reject opinions that are
 9 unexplained. *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th Cir. 2012) (“We have held that the
 10 ALJ may ‘permissibly reject [] . . . check-off reports⁵ that [do] not contain any explanation of the
 11 bases of their conclusions”).

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 13
 14 Finally, the Appeals Council noted that Dr. Michiel’s opinion was undermined by the prior
 15 consultative examining opinion of Dr. Lewis on November 12, 2016, which identified no such
 16 limitations. AR 11 (citing AR 504–05). Granted, Dr. Lewis’s opinion was issued much earlier
 17 than Dr. Michiel’s, but there is no identified evidence suggesting that Plaintiff’s mental conditioned
 18 worsened in the interim. The Appeals Council’s rejection of Dr. Michiel’s opinion was further
 19 buttressed by the opinion of Dr. Lewis, which was based on her own examination of Plaintiff. *See*
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⁴ To be precise, the Appeals Council’s articulated reasoning was only directed at the narrative opinion in which Dr. Michiel identified limitations related to task complexity, not to the additional check-the-box Medical Source Statement of Ability To Do Work Related Activities in which Dr. Michiel identified additional limitations related to work related judgment and responding to changes in work setting. Plaintiff did not separately challenge the Appeals Council’s lack of acknowledgment of those additional identified moderate limitations, or the Appeals Council’s implicit rejection of the same. Although the Court may raise issues *sua sponte* to prevent a manifest injustice, the Court finds no such injustice would take place here. The Appeals Council’s reasoning is equally applicable to the limitations as to judgment and responding to changes in work setting as the objective mental status examination does not support such limitations, and the basis for those limitations was equally unexplained by Dr. Michiel. Notwithstanding that there is a gap in the Appeals Council’s reasoning which the Court has identified and is filling, and because Plaintiff did not independently identify that gap as a basis for remand, and because that the gap is easily filled, the Court will not remand on that basis.

⁵ Much like in *Molina*, Defendant criticizes the opinion as an unexplained “check-box questionnaire.” The form is a pre-printed SSA approved form (OMB No. 0960-0660) which asks for the limitations to be identified by checking boxes. It also asks for narrative explanations supporting those limitations. It is the lack of such an explanation, not the check the box format, that justifies rejecting the opinion.

1 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989) (“To the extent that other physicians’
2 conflicting opinions rested on independent, objective findings, those opinions could constitute
3 substantial evidence.”).

4
5 The Appeals Council’s rejection of Dr. Michiel’s opinion was supported by specific and
6 legitimate reasoning, namely: 1) examination results not suggestive of the identified limitations, 2)
7 no explanation provided by Dr. Michiel explaining the basis for the opinion, and 3) Dr. Lewis’s
8 contrary consultative opinion.

9 **VI. Conclusion and Order**

10 For the reasons stated above, the Court finds that substantial evidence and applicable law
11 support the ALJ’s conclusion that Plaintiff was not disabled. Accordingly, Plaintiff’s appeal from
12 the administrative decision of the Commissioner of Social Security is denied. The Clerk of Court
13 is directed to enter judgment in favor of Defendant Kilolo Kijakazi, acting Commissioner of Social
14 Security, and against Plaintiff Alex Keovelai.

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17 IT IS SO ORDERED.

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19 Dated: May 20, 2022

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE